

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**



# 74-1467

**ORIGINAL**

In The  
**United States Court of Appeals**  
For The Second Circuit

B  
P45.

SALVATORE MANGIAMELLI,

*Petitioner-Appellant,*

vs.

UNITED STATES OF AMERICA,

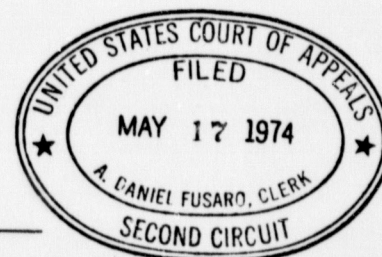
*Respondent-Appellee.*

---

## APPELLANT'S APPENDIX

---

FRANK A. LOPEZ  
*Attorney for Petitioner-Appellant*  
31 Smith Street  
Brooklyn, New York 11201  
(212) 237-9500



(7052)

**LUTZ APPELLATE PRINTERS, INC.**  
Law and Financial Printing

South River, N.J. New York, N.Y. Philadelphia, Pa. Washington, D.C.  
(201) 257-6850 (212) 565-6377 (215) 563-5587 (202) 783-7288

PAGINATION AS IN ORIGINAL COPY

## TABLE OF CONTENTS

### Appendix

	Page
Docket Entries . . . . .	1a
Opinion - Order Denying Vacatur of Judgment of Conviction Filed February 26, 1974 (Palmieri, D.C.J.) . . . . .	2a
Notice of Appeal (Filed March 6, 1974) . . .	9a
Notice of Motion (Filed October 11, 1973) . .	10a
Petition of Salvatore Mangiamelli (Filed October 11, 1973) . . . . .	12a
Affidavit of Assistant United States Attorney Thomas M. Fortuin in Opposition Dated November 13, 1973 . . . . .	24a

DOCKET ENTRIES

October 11th, 1973

Notice of Motion and  
Appellant's Petition  
for 28 U.S.C. §2255 filed.

November 13th, 1973

Affidavit of Assistant  
United States Attorney  
Thomas M. Fortuin, Esq.,  
in Opposition.

February 26th, 1974

Opinion-Order Denying  
28 U.S.C. § 2255 Relief.

March 6th, 1974

Notice of Appeal Filed.

OPINION-ORDER DENYING VACATUR OF JUDGMENT OF CONVICTION  
FILED FEBRUARY 26th, 1974 (PALMIERI, D.C.J.)

E.P. CR 42 MEMO 528

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----  
SALVATORE MANGIAMELLI,

Petitioner-Defendant,

-against-

UNITED STATES OF AMERICA,

Respondent.  
-----

PALMIERI, J.

This is a petition pursuant to 28 U.S.C. § 2255 (1970) seeking the vacatur of the judgment of conviction entered on November 20, 1972, by this Court after conviction by a verdict of a trial jury.

Briefly stated, the events which engendered this petition relate to the submission to the jury, by the acknowledged fault of defense counsel, of a copy of the indictment which contained an extraneous notation referring to a co-defendant whose trial had been severed, but who was subsequently murdered, with much attendant publicity. Before the jury was selected the Court and counsel had agreed that knowledge of the murder, by the jurors, might be prejudicial and the Court examined them and ascertained that they had no knowledge of the murder.

73 Civ. 425

#40393

FILED  
FEB 26 11 29 AM '74  
U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

FEB 26 1974

Opinion-Order Denying Vacatur of Judgment of Conviction  
Filed February 26th, 1974 (Palmieri, D.C.J.)

The notation consisted of those written words: "Ciprio's murder inadmissible since prejudice obliterates its minor relevance and the jury might infer mango [petitioner] had something to do with it, etc." When the jury saw this the Foreman sent a note to the Court. Defense counsel immediately acknowledged fault and moved for a mistrial. The Court denied the motion but with leave to renew after the verdict. The Court then sent an unannotated copy of the indictment to the jury with a note instructing them to disregard any notations which they might have read on the original exhibit. The jury deliberated for two days thereafter and ultimately found the defendant guilty.

After the verdict the Court discharged the jury but called the Foreman into chambers. In the presence of all counsel the Court questioned the Foreman and ascertained that the jury had received the Court's instructions. In response to an inquiry as to whether there was any further discussion of the notation on the indictment the Foreman indicated that before he had advised the Court of the notation the jury had taken a vote and unanimously decided that the notation would not bias its judgment. The Court then excused the Foreman.

Petitioner then retained new counsel and appealed to the United States Court of Appeals for the Second Circuit. The Circuit Court unanimously affirmed the defendant's

Opinion-Order Denying Vacatur of Judgment of Conviction  
Filed February 26th, 1974 (Palmieri, D.C.J.)

conviction from the bench. United States v. Mangiameli,  
472 F.2d 1404 (2d Cir. 1973). Defendant then made a pro se  
petition for a Writ of Certiorari to the Supreme Court.  
The petition was denied. Mangiameli [sic] v. United States,  
412 U.S. 939 (1973).

On appeal to the Second Circuit petitioner submitted  
an eighty-three page brief prepared by four attorneys raising  
eight major points. Point Seven was entitled: "The Court's  
refusal to declare a mistrial sua sponte because of the  
prejudicial reference to Ciprio's murders noted on papers  
inadvertently taken to the jury room, or to poll the jury  
at its own behest, rendered the jury verdict a nullity and  
deprived appellant of a fair trial and due process of law."

The main contentions of this petition reduce to  
the following:

- (1) Petitioner was denied due process and equal  
protection of the law by virtue of (a) his absence during  
these events, due to the failure of defense counsel and  
the Court to secure his presence, and (b) the communication  
of the annotation by the Jury Foreman, who first saw it, to  
the rest of the jury;
- (2) The Jury Foreman's actions, set out above,  
prejudiced the defendant and required a mistrial;
- (3) Petitioner was denied effective assistance  
of counsel because of petitioner's absence during these events.

Opinion-Order Denying Vacatur of Judgment of Conviction  
Filed February 26th, 1974 (Palmieri, D.C.J.)

This petition is clearly an attempt to relitigate issues which were raised and decided against petitioner on appeal. Petitioner's claims of prejudice with respect to the occurrences at his trial pertaining to the submission of inadmissible evidence to the jury and subsequent events in curing that error (arising by fault of petitioner's defense counsel) were a major basis for his appeal from the judgment.

The contentions raised here based on that series of events are unquestionably mere recharacterizations of the point raised on appeal, Sandors v. United States, 373 U.S. 1, 16 (1963), and as such have already been determined adversely to petitioner and disentitle him to collaterally attack the same occurrences by way of this § 2255 application. Kaufman v. United States, 394 U.S. 217, 227 n.8, 230 (1969), citing with approval, Thornton v. United States, 368 F.2d 822, 833 (D.C. Cir. 1966) (dissenting opinion of Wright, J.).

Since it does not appear, nor does petitioner demonstrate, nor indeed even allege, that a redetermination of these issues would serve the ends of justice, 28 U.S.C. § 2244(a)(1970), this Court, in the exercise of its discretion, declines the invitation to permit relitigation of issues already heard and adjudicated.

Petitioner alleges that his absence during these particular events resulted in abridgments of his rights to

Opinion-Order Denying Vacatur of Judgment of Conviction  
Filed February 26th, 1974 (Palmieri, D.C.J.)

confrontation, due process and equal protection of the laws. This too constitutes an attempt to collaterally attack a judgment on grounds previously raised on appeal. This kind of contention must be regarded as a precursor to a serialized set of petitions raising every conceivable argument with respect to these occurrences as they occur to the petitioner. While petitioner is entitled to an unimpaired right of appeal or other avenues of review, this particular track does not fall within the purview of those rights and petitioner is not entitled to pursue this course.

In any event, the posture of this case at this point is such that these must initially survive the application of the "harmless error" doctrine. United States v. Schor, 418 F.2d 26, 30 (2d Cir. 1969). In this regard we have the retrospective benefit of the implicit conclusion on appeal that the procedures followed by the Court, with the explicit approval of defense counsel, did not prejudice the defendant. Thus it seems fair to conclude that the affirmance of those procedures constitutes a sufficient basis to satisfy even the stricter standard of harmless error "beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 21-24 (1967). Compare Kottealos v. United States, 328 U.S. 750, 764-65 (1946) (fair assurance that the verdict was not affected). See United States v. Glick, 463 F.2d 491, 494 (2d Cir. 1972).

Opinion-Order Denying Vacatur of Judgment of Conviction  
Filed February 26th, 1974 (Palmieri, D.C.J.)

Finally, petitioner alleges that he was denied effective assistance of counsel because defense counsel failed to renew his motion for a mistrial after the adverse verdict was handed down and because defense counsel failed to secure petitioner's presence during the occurrences which are the subject of this petition.

The renewal of the motion for a mistrial is clearly a tactical question and consequently does not afford a constitutional ground for relief. United States v. Currier, 405 F.2d 1039, 1043 (2d Cir.), cert. denied, 395 U.S. 914 (1969). Moreover, after carefully reexamining the record, particularly with respect to the events in question, we conclude that petitioner was adequately represented at the trial by defense counsel and that the failure to demand petitioner's presence at the pertinent time was not such error as to "shock the conscience of the Court" and to render the proceedings a "farce and mockery of justice." United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950); United States ex rel. Crispin v. Mancusi, 443 F.2d 233, 237 (2d Cir.), cert. denied, 404 U.S. 967 (1971); United States ex rel. Walker v. Henderson, slip op. 1223, 1225 (2d Cir. January 7, 1974). See also United States ex rel. Bloeth v. Denno, 313 F.2d 364, 374 (2d Cir.), cert. denied, 372 U.S. 978 (1963) (poor and even disastrous tactics by experienced counsel do not give rise to denial of due process).

8a

Opinion-Order Denying Vacatur of Judgment of Conviction  
Filed February 26th, 1974 (Palmieri, D.C.J.)

Petition denied. It is so ordered.

Dated: New York, N. Y.  
February 26, 1974

  
EDMUND L. PALMIERI  
U. S. D. J.

## NOTICE OF APPEAL (FILED MARCH 6th, 1974)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
SALVATORE MANGIAMELLI,

Petitioner - Appellant.

73 Civ 4355

-against-

NOTICE OF APPEAL

UNITED STATES OF AMERICA,

Respondent - Appellee.

-----x  
S I R S :

PLEASE TAKE NOTICE, that the Petitioner - Appellant herein hereby appeals to the United States Court of Appeals for the Second Circuit, from the Order denying relief pursuant to 28 U.S.C. §2255, entered February 26th, 1974, by the HONORABLE EDMUND L. PALMIERI United States District Court Judge, and from each and every part of said judgment and or Order.

DATED: Brooklyn, New York, March 4th, 1974

Yours, etc.,

FRANK A. LOPEZ  
Attorney for Petitioner - Appellant  
21 Smith Street  
Brooklyn, New York 11201  
Tel. # (212) 227-1500

TO:

HON. PAUL J. CUFERAN  
United States Attorney  
Southern District of New York  
40 Centre Street  
New York City, New York 10007

CLERK.

NOTICE OF MOTION (FILED OCTOBER 11th, 1973)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
SALVATORE MANGIAMELLI,

Petitioner-Defendant,

-against-

THE UNITED STATES OF AMERICA,

Respondent,  
-----X

*73 CIVIL 4335*

Docket No. 72 Cr. 2307

Title 28 U.S.C. 2255

S I R S :

PLEASE TAKE NOTICE, that upon the petition of SALVATORE MANGIAMELLI, verified the 20th day of August, 1973, the annexed affidavit of FRANK A. LOPEZ, Esq., duly sworn and subscribed to the 20th day of August, 1973, that upon the indictment, papers, proceedings had herein, and judgment pronounced and filed November 20th, 1972, by the HONORABLE EDMUND L. PALMIERI, U.S.D.J., the undersigned will move this Court on the *30th* day of *OCTOBER* ~~September~~, 1973, before the HONORABLE EDMUND L. PALMIERI, United States District Court Judge at the United States Courthouse, Foley Square, in the Borough of Manhattan, City and State of New York, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for relief pursuant to Title 28 United States Code, 2255, vacating the judgment of conviction and sentence

## Notice of Motion (Filed October 11th, 1973)

pronounced by the HONORABLE EDMUND L. PALMIERI, United States District Court Judge, on November 20th, 1972, upon the Petitioner-Defendant herein on the grounds that (a) there was a substantial denial of the protection and rights afforded by the Sixth Amendment of the United States Constitution: (b) the ineffectual assistance of counsel; (c) exclusion of the Petitioner-Defendant during crucial periods of the trial proceedings; (d) misconduct of the jury foreman and other members of the jury: and for other reasons more fully and amply set forth in the Petition and affidavit annexed hereto, together with such other and further relief as the Court may deem just and proper in the circumstances

DATED: Brooklyn, New York, August 20th, 1973.

Yours, etc.,

ROSENBERG, FUSFIELD & LOPEZ  
By FRANK A. LOPEZ  
Attorneys for Petitioner-Defendant  
SALVATORE MANGIAMELLI  
31 Smith Street  
Brooklyn, New York 11201  
Telephone (212) 237-9500

TO:

CLERK, CRIMINAL TERM  
United States District Court  
Foley Square  
New York, New York 10007

HONORABLE EDMUND L. PALMIERI  
United States District Court Judge  
United States Courthouse  
Foley Square  
New York, New York 10007

ASSISTANT UNITED STATES ATTORNEY WALTER S. ROWLAND  
Office of the United States Attorney  
Southern District of New York  
United States Courthouse  
New York, New York 10007

PETITION OF SALVATORE MANGIAMELLI (FILED OCTOBER 11th,  
1973)  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
SALVATORE MANGIAMELLI,

Petitioner-Defendant,

-against-

Docket No. 72 Cr. 2307

THE UNITED STATES OF AMERICA,

P E T I T I O N

Respondent,  
-----X

PETITION TO VACATE, SET ASIDE, JUDGMENT  
OF CONVICTION PURSUANT TO 28 U.S.C. §2255.

Petitioner, SALVATORE MANGIAMELLI, to be hereafter referred to as Petitioner herein, in the above-entitled cause of action, and pursuant to the provisions of Title 28 U.S.C. §2255, respectfully moves the Court to vacate and set aside the Judgment of conviction rendered against him on November 20th, 1972, in the United States District Court, Southern District of New York, by the HONORABLE EDMUND L. PALMIERI, United States District Court Judge, wherein the Petitioner herein was sentenced to a term of five (5) years and to pay a committed fine of \$10,000 00, for the reasons stated and set forth herein as follows:

(1) That I am the Petitioner-Defendant in the above-entitled action and I am presently under service of sentence at the United States Penitentiary in Atlanta, Georgia, pursuant to the judgment of conviction entered against me on November 20th, 1972, by the HONORABLE EDMUND L. PALMIERI, United States District Court Judge, after

Petition of Salvatore Mangiamelli (Filed October 11th,  
1973)

conviction by a verdict of a jury of the crime of Conspiracy to commit interstate theft and sale of stolen securities valued in excess of \$5,000.00, in violation of Title 18 U.S.C. §§2314 and 2315 That said sentence was for a term of five (5) years and to pay a committed fine of \$10,000.00.

(2) That I have retained the firm of ROSENBERG, FUSFIELD & LOPEZ, Esqs., of 31 Smith Street, Brooklyn, New York 11201, as my attorneys in the instant matter.

(3) That I have read the annexed affidavit of FRANK A. LOPEZ, Esq., dated August 20th, 1973, and the same is true to the best of my knowledge and belief.

(4) That after my conviction by a trial jury and imposition of sentence as recited above, a Notice of Appeal was duly filed in my behalf, and on March 1st, 1973, the United States Court of Appeals for the Second Circuit, unanimously affirmed the conviction without opinion (472 F2nd 1404).

On JUNE 11, 1973, the United States Supreme Court denied an Application for a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. No further Applications, motions or petitions were taken against this judgment of conviction and no prior Application pursuant to §2255 has previously been made in connection with the judgment of conviction entered herein.

(5) That in the trial proceedings before the United States District Court, for the Southern District of New York, your Petitioner herein was represented by ALBERT J. BRACKLEY, Esq., of 44 Court

Petition of Salvatore Mangiamelli (Filed October 11th,  
1973)

Street, Brooklyn, New York 11201. Petitioner herein was represented on the direct Appellate process to the United States Court of Appeals for the Second Circuit by Fontana and Geoly, Esqs., of 32 Court Street, Brooklyn, New York 11201. That on the petition for a writ of Certiorari your Petitioner herein proceeded pro se

(6) That the instant application is for the vacatur of the judgment of conviction rendered against your Petitioner on November 20th, 1972, for the following reasons:

(a) Petitioner was denied the right to be present at all stages of the trial and was furthermore denied the right to confrontation by his involuntary exclusion from the trial proceedings on two crucial and vital occasions and moreover, by his physical exclusion was prevented from participating in the judicial inquiry during the course of trial relative to the jury's communication for special instructions on an unauthorized and highly prejudicial written notation mistakenly given to the trial jury and read and discussed by the entire body during the course of their deliberations. By his absence and exclusion the Petitioner was denied due process and equal protection of the law;

(b) The jury foreman's misconduct on learning privately of highly prejudicial information and in communicating it publicly to the rest of the jurors by showing it to them and further discussing it with them during the course of deliberation was flagrant and prejudicial and resulted in the contamination of the entire deliberating body, mandating a new trial in the interests of justice;

Petition of Salvatore Mangiamelli (Filed October 11th,  
1973)

(c) Petitioner was denied his Sixth Amendment right to the effective assistance of counsel when his trial attorney failed to fully protect Petitioner's right in permitting his involuntary absence on two crucial and critical stages of the trial proceeding precisely at a time and period when the jury was seeking the Court's instruction on the course of action to take with regard to the unauthorized and prejudicial information received by them during the course of their deliberations. The failure of defense counsel to demand the presence of the Petitioner-Defendant, to ask for a fact-finding hearing as to the contamination of the trial jury, and for a renewal for a Motion of Mistrial rendered legal assistance completely ineffectual to the Petitioner herein

(d) The Court denied Petitioner herein due process and equal protection of the law by failing to properly apply Constitutional standards in relation to (1) stating reasons on the record as to why the Petitioner-Defendant should be excluded from the Court proceedings on two critical and crucial occasions; (2) In relation to the misconduct of the foreman and the contamination of the remaining jurors when the Court became aware that the jurors discussed among themselves the prejudicial written notations and conducting an unauthorized poll among themselves in order to determine any resulting bias and prejudice in the deliberating room.

(7) Originally General Gennaro Ciprio was a co-defendant with the Petitioner herein. However, a severance was granted as to Ciprio in view of the fact that he had also been indicted with several others on November 4th, 1971 by the United States District Court in Illinois

Petition of Salvatore Mangiamelli (Filed October 11th,  
1973)

Following the severance and just prior to the selection of the jury on September 6th, 1972, MANGIAMELLI'S counsel informed the Court that "In the meantime, Ciprio has been shot and is dead and is not available as a witness." (28a).

The Government stated to the Court that "there was some publicity about Ciprio when he got killed, I think there was a television program about Ciprio" (29a) To avoid any possible prejudice to defendant, the Court thereupon questioned the jurors "whether any of you have been exposed to any publicity affecting a person named Gennaro Ciprio, C-I-P-R-I-O? Does that name mean anything to you? I take it from your silence that it does not." (33a)

The Court duly admonished the jury "If at any time during the trial either by way of accidental exposure to any published news you feel that unprejudiced judgment has in any way been impaired, you must consult with me immediately so that I can determine whether your capacity as a juror has been so affected as to make it necessary to excuse you." (61a).

The record shows that the Court stated to the jury "The indictment I read cannot be sent in because it has notations on it that would not be a matter for your concern, so I am getting a copy of the indictment without the notations and that will be sent into you " (293a)

Petition of Salvatore Mangiamelli (Filed October 11th,  
1973)

After the deliberations of the jury began at 2:53 P. M., September 7th, 1972, the Foreman addressed a note to the Court, and at 3:50 P. M. it read as follows:

"Jury Foreman requests a word with Judge. The annotated copy of the indictment was mistakenly sent into the jury and the notes and inadmissible evidence were seen" (Court ex. 2: 350a).

The "inadmissible evidence" referred to by the jury foreman was a notation appearing on a copy of the 20-page Illinois indictment (Def. Ex. A, pp. 359a-379a) which had been sent into the jury room with a copy of the New York indictment inadvertently attached thereto, on the back of which were these written words:

"Ciprio's murder inadmissible since prejudice obliterates its minor relevance and the jury might infer mango had something to do with it, etc., (296a-379a)

In MANGIAMELLI'S absence, without his consent and knowledge the following took place

At pp. 296a-297a the Court said: At the outset of the trial Mr. Brackley requested and I granted that there should be no references either to Ciprio's death or murder and we want to eliminate that as a possible source or prejudice to the defendant. This statement unfortunately dilutes much of the care we took to keep it out of the case and I am willing to do two things, physically detach the New York indictment and say nothing to the jury, or to attach a note to the jury saying that the New York indictment should not have been attached to it and would they please disregard anything that may have been on it.

Petition of Salvatore Mangiamelli (Filed October 11th,  
1973)

MANGIAMELLI'S counsel moved for a mistrial by stating the following:

"\* \* \* I must accept full responsibility for the error, if it is error, but it is the defendant who is on trial, not myself, and I would feel that the information may prejudice the jury to the point where they can't give him a fair trial and I would reluctantly ask for a mistrial. I certainly would not want that information before the jury and I would have no reason to put it before them other than through a mistake, \* \* \* " (297a-298a).

In response the Court said: "I prefer to detach it and to give them a warning in writing. It may be they will acquit him and we won't have a problem." (298a).

The Court denied the mistrial without prejudice to renew it if and when a guilty verdict is returned.

Then without polling the jury or any further ado the Court permitted the jury to continue their deliberations. A new copy of MANGIAMELLI'S exhibit was sent to the jury with a note instructing them to disregard any of the notations on the previous exhibit.

After the return of the verdict of guilty the Court discharged the jury, but called the jury foreman into chambers. In the presence of both counsel, but without MANGIAMELLI'S presence, knowledge or consent the following took place:

The Court: Make a note that the attorneys are here. Mr. Goode, I thought I should detain you to ask you one or two quick questions about this note that you sent in. This is your note where you say,

Petition of Salvatore Mangiamelli (Filed October 11th, 1973)

"Jury Foreman requests a word with the Judge The annotated copy of the indictment was mistakenly sent into the jury and notes of inadmissible evidence were seen." I realize now that you must have been referring to the pencilled notes on the back of that Chicago indictment, but actually the notes were not on the Chicago indictment but on the New York indictment which was attached to it Can you tell me what those notes were that you saw?

The Foreman: There was a note in back of one of the sheets and the note read "Ciprio murdered. This is the inadmissible evidence."

By the Court:

Q. Did all the jury see that? A. Yes.

Q. Then it became general knowledge? A. Yes.

Q. Later on I detached that part of the exhibit and wrote you a note directing you to disregard that. Did the jury receive that note? A. Yes.

Q. Was there any further discussion about those annotations? A. Well, we had taken previously a vote as to whether we thought this would bias our judgment, and we unanimously decided it would not That was before we got your note and before we sent our note out

The Court: Thank you very much

Petition of Salvatore Mangiamelli (Filed October 11th,  
1973)

WHEREFORE, It is respectfully requested in the interest of justice that the Court assume jurisdiction of the instant Application and Order an evidentiary hearing or vacate the judgment and Order a new trial, together with such other and further relief as may be just and proper in the circumstances.

Salvatore Mangiamelli

SALVATORE MANGIAMELLI  
PETITIONER-DEFENDANT

STATE OF GEORGIA     )  
                                  SS  
COUNTY OF FULTON    )

SALVATORE MANGIAMELLI, being first, duly sworn, states under oath, that he has read and has subscribed to the foregoing petition, and does state, that the information therein is true and correct to the best of his knowledge and belief.

Salvatore Mangiamelli

SALVATORE MANGIAMELLI  
PETITIONER-DEFENDANT

Sworn and subscribed to  
before me this 20th day of  
~~August~~, 1973.  
Sept.

William Carr Jr. x

Petition of Salvatore Mangiamelli (Filed October 11th,  
1973)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

SALVATORE MANGIAMELLI,

Petitioner-Defendant,

-against-

Docket No. 72 Cr.  
2307

THE UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF ATTORNEY.

-----x

STATE OF NEW YORK       )  
                                  SS.:  
COUNTY OF KINGS       )

FRANK A. LOPEZ, Esq., being duly sworn deposes and says:

(1) That I am an attorney and counselor at law, licensed to practice in the State of New York, admitted to practice to this Court, with offices at 31 Smith Street, Brooklyn, New York 11201.

(2) That I am one of the attorneys for the Petitioner-Defendant SALVATORE MANGIAMELLI in this Application for relief pursuant to 28 U.S.C. §2255.

(3) That I have read the verified Petition of SALVATORE MANGIAMELLI annexed hereto, the trial and Appellate records and affirm the correctness of paragraphs 1 through 5 in the verified Petition attached hereto.

(4) That your deponent verily believes that the Petitioner herein has a meritorious course of action and complies with the provisions

Petition of Salvatore Mangiamelli (Filed October 11th, 1973)

of 28 U.S.C. § 2255. That the instant application is a three-phase attack upon substantial errors of law committed by the trial jury, defense counsel and the Court which highly prejudiced the Petitioner during the course of trial and at the very minimum necessitates a vacatur of the judgment of conviction and a new trial. The exclusion of the Petitioner-Defendant herein on crucial occasions during the course of trial without justification or reasons spread upon the record, the highly prejudicial information that was previously excluded from the trial and thereafter given to the jury foreman during the course of deliberations the jury foreman's misconduct, the contamination of the jury with the highly prejudicial information, the failure of defense counsel during the course of trial to fully protect Petitioner's rights in permitting his involuntary absence on two crucial and critical stages of the trial and the Court's failure to take appropriate action or stating on the record the reasons for the Petitioner's exclusion mandates, in your deponent's belief an evidentiary hearing, a vacatur of the judgment of conviction and a new trial.

(5) A memorandum of Law in support of this application is submitted herewith.

(6) No previous Application for relief sought here has previously been made.

WHEREFORE; it is respectfully requested in the interests of justice that the Court assume jurisdiction of the instant Application and Order an evidentiary hearing and/or vacate the judgment of conviction and

23a

Petition of Salvatore Mangiamelli (Filed October 11th,  
1973)

Order a new trial, together with such other and further relief as may be  
just and proper in the circumstances.

---

FRANK A. LOPEZ

Sworn and subscribed

to before me this

day of August 1973.

AFFIDAVIT OF ASSISTANT UNITED STATES ATTORNEY THOMAS M.  
FORTUIN IN OPPOSITION DATED NOVEMBER 13th, 1973

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

SALVATORE MANGIARULLI,

Petitioner-Defendant,

-v-

UNITED STATES OF AMERICA,

Respondent.

73 Civ. 4335 (ELP)

STATE OF NEW YORK  
COUNTY OF NEW YORK  
28 U. S. C. SECTION 2385

DANIEL A. GURMAN  
United States Attorney for the  
Southern District of New York  
Attorney for the United States  
of America

THOMAS M. FORTUIN  
Assistant United States Attorney  
of Counsel

TTF:iv

Affidavit of Assistant United States Attorney Thomas M.  
Fortuin in Opposition Dated November 13th, 1973

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
SALVATORE MANGIAMELLI,

: 73 Civ. 4335(ELP)

Petitioner-Defendant, :

- v - :

UNITED STATES OF AMERICA, :

Respondent. :

-----X  
AFFIDAVIT OPPOSING MOTION  
FOR RELIEF PURSUANT TO 28  
U. S. C. SECTION 2255

STATE OF NEW YORK )  
COUNTY OF NEW YORK : ss.:  
SOUTHERN DISTRICT OF NEW YORK )

THOMAS M. FORTUIN, being duly sworn, deposes and  
says:

1. I am an Assistant United States Attorney with knowledge of the files and records of this case.
2. I submit this affidavit in opposition to the defendant's motion for relief pursuant to 28 U.S.C. Section 2255.
3. The defendant, Salvatore Mangiamelli, was tried before this Court and a jury on September 6 through September 11, 1972. The jury found Mangiamelli guilty on one count of conspiracy to transport and sell stolen securities, valued in excess of \$5,000, in interstate commerce in violation of Title 18, United States Code, Section 371. On November 20, 1972, this Court sentenced defendant to a term of imprisonment of five years and imposed a \$10,000 committed fine.

TMF:lw

Affidavit of Assistant United States Attorney Thomas M. Fortuin in Opposition Dated November 13th, 1973

4. At trial, defendant was represented by Albert J. Brackley. During the course of the trial, Mr. Brackley introduced in evidence an indictment which had the following notation on the back:

"Ciprio's (a co-conspirator's) murder inadmissible since prejudice obliterates its minor relevance and the jury might infer mango had something to do with it, etc." 296a-99a."

5. Shortly after the jury began its deliberation, the Foreman addressed a note to the Court, which read as follows:

"Jury Foreman requests a word with Judge. The annotated copy of the indictment was mistakenly sent into the jury and the notes and inadmissible evidence were seen."  
(Court ex. 2; 350a)

6. On hearing the note read, defendant's counsel stated to the Court, "I must accept full responsibility for the error, if it is error," (297a-98a) and moved for a mistrial. The motion was denied with leave to renew the motion if a guilty verdict were returned. The Court then obtained a fresh copy of the defense exhibit and sent the new copy of the exhibit to the jury with a note to the jury instructing them to disregard any of the notations which they may have read on the original exhibit. Mangiamelli's counsel consented to the Court's procedure and specifically requested that no oral instructions be given to the jury:

THE COURT: Mr. Brackley, you consented to that note being sent in immediately?

MR. BRACKLEY: Yes.

MR. ROWLAND: And you did not want any instructions to the jury?

MR. BRACKLEY: No. (333a).

TMF:lw

Affidavit of Assistant United States Attorney Thomas M.  
Fortuin In Opposition Dated November 13th, 1973

7. After the return of the verdict, the Court in the presence of counsel but not the defendant called the jury foreman into chambers and questioned the foreman regarding the notations on the original defense exhibit. The foreman stated that when the jury became aware of the notations and before informing the Court of the problem they took a vote and voted unanimously that the notations would not bias their judgment (332a). Mangiamelli's counsel did not renew the motion for a mistrial.

8. Defendant appealed from his conviction and raised the same issues that he seeks to relitigate here. On appeal defendant was represented by the firm of Fontana and Gooly. They filed an eighty-three page brief raising eight points and prepared by four lawyers. Defendant's trial counsel did not participate in writing appellate brief. Ten pages of that brief related to the procedures followed by this Court on learning of the notation on the back of the indictment submitted by defendant's trial counsel. Point Seven of the Brief was that "The Court's refusal to declare a mistrial sua sponte because of the prejudicial reference to Ciprio's murder noted on papers inadvertently taken to the jury room, or to poll the jury at its own behest, rendered the jury verdict a nullity and deprived appellant of a fair trial and due process of law." Copies of the pages from defendant's brief dealing with Point Seven are attached hereto as Exhibit A and incorporated herein by reference.

9. The Government responded to defendant's allegations in Point Four of its brief and devoted three pages

Affidavit of Assistant United States Attorney Thomas M. Fortuin In Opposition Dated November 13th, 1973

TMF:lw

thereto. Copies of the pages from the Government's brief concerning Point Four are attached hereto as Exhibit B and incorporated herein by reference.

10. On March 1, 1973, the United States Court of Appeals for this Circuit unanimously affirmed defendant's conviction from the bench. 472 F. 2d 1404. Defendant's petition for Writ of Certiorari was denied by the Supreme Court on June 11, 1973.

11. In September of this year, the defendant, this time represented by a third set of lawyers, the firm of Rosenberg, Fusfield & Lopez, filed this motion pursuant to 28 U.S.C. Section 2255 attempting to relitigate and, in fact, seeking a redetermination of propriety of the procedures followed by this Court after learning that the notation had reached the jury, notwithstanding the fact that the same issues had already been determined adversely to defendant after being extensively litigated on the merits before the Court of Appeals. The defendant's motion does not allege any new facts; nor does it allege that there are new facts. It does not challenge the regularity or insufficiency of the prior proceedings. No claim is made that a redetermination is required in the interests of justice.

12. Defendant's motion merely recharacterizes the previous arguments in terms of defendant's right to be effectively assisted by counsel and to be present at all stages of the trial; (2) that because of his absence he was denied effective assistance of counsel; and (3) that his absence and the communications by the jury foreman deprived him of due

Affidavit of Assistant United States Attorney Thomas M.  
Fortuin in Opposition Dated November 13th, 1973

TMF:fw

process and equal protection of the laws. Defendant also contends that the communication of the note by the jury foreman, who first saw it, to the other jurors was prejudicial and required a mistrial.

*Thomas M. Fortuin*

THOMAS M. FORTUIN  
Assistant United States Attorney

Sworn to before me this  
13th day of November, 1973.

\_\_\_\_\_  
Notary Public

U.S. COURT OF APPEALS:SECOND CIRCUIT

Index No.

MANGIAMELLI,

Petitioner-Appellant,  
against

Affidavit of Personal Service

U.S.A.,

Respondent-Appellee.

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Victor Ortega, being duly sworn,  
deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York  
That on the 16th day of May 1974 at Foley Square, New York

deponent served the annexed Appellant's Appendix

upon

Paul J. Curran-U.S. Attorney for the Southern Dist.

the in this action by delivering a true copy thereof to said individual  
personally. Deponent knew the person so served to be the person mentioned and described in said  
papers as the Attorney(s) herein,

Sworn to before me, this 16th  
day of May 19 74

*Victor Ortega*  
.....  
Print name beneath signature

VICTOR ORTEGA

*Robert T. Brin*

ROBERT T. BRIN  
NOTARY PUBLIC, STATE OF NEW YORK  
NO. 31 - 0418950  
QUALIFIED IN NEW YORK COUNTY  
COMMISSION EXPIRES MARCH 30, 1975